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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No._____

LOREN J. PIKE, as Supervisor of Inspection,
Arizona Fruit and Vegetable Standardization Service,
Appellant,

versus

BRUCE CHURCH, INC., a California corporation,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the three judge district court has not yet been officially reported. A copy of that opinion is set forth in full in the Appendix.

JURISDICTION

This is an appeal from the judgment of a three judge district court enjoining the appellant from enforcing an order issued by him pursuant to the provisions of the Arizona Fruit and Vegetable Standardization Act. The court originally entered an

opinion and judgment on January 29, 1969. Following a Motion for Rehearing and/or Clarification, the court withdrew its first opinion, and issued a second opinion and judgment dated March 4, 1969, and filed on March 10, 1969. A Motion for Rehearing was filed on April 1, 1969, and denied by order entered May 1, 1969. The Notice of Appeal was filed May 2, 1969. This appeal is taken from the judgment contained in the lower court's second opinion and the denial of the Motion for Rehearing pertaining thereto.

This Court has jurisdiction by virtue of 28 U.S.C. § 1253.

STATUTE INVOLVED

Arizona's Fruit and Vegetable Standardization Act, Arizona Revised Statutes, Title 3, Chapter 3, Article 4, prescribes minimum standards pertaining to quality and packing for Arizona fruits and vegetables. Specifically involved in this case are the following sections of that Act:

A.R.S. § 3-482.

Scope of article; containers

A. All fresh fruits and vegetables when being packed, after packing, when delivered for shipment, loaded, shipped, being transported, offered for sale or sold in this state, for which grades, standards and standard containers are established in this article, shall come within the meaning of this article.

B. All lots of fruits and vegetables packed for sale, offered for sale, transported for sale or sold in this state shall be packed in new or clean containers.

A.R.S. § 3-483.

Supervisor of inspection; appointment; oath; bond; deputies and clerks; qualifications

A. There is created the office of supervisor of inspection, hereinafter referred to as the supervisor.

B. The supervisor, who shall enforce this article, shall be appointed by and shall hold office at the pleasure of the dean

of agriculture of the university of Arizona, who shall also supervise and direct the supervisor.

C. The supervisor may employ and discharge deputies and clerks as his needs may require. No person related to the supervisor by blood or marriage shall be appointed deputy or clerk.

D. The supervisor shall take and file the oath of office, and shall give a surety bond to the state for the faithful performance of his duties.

E. The supervisor and deputies shall be experienced in the inspection of fruits and vegetables and in commercial packing practices, and each shall hold, at the time of appointment, a federal fruit and vegetable inspector's license.

A.R.S. § 3-503.

Cantaloupes; definitions; serious damage; standard packs; crate markings; irregular sized container; exception

A. Cantaloupes shall be mature but not overripe, fairly well netted, and free from mold, decay and insect damage which has penetrated or damaged the edible portion of the cantaloupe, and free from serious damage due to bruises, sunburn, growth cracks, cuts, sponginess, flabbiness, wilting, or other causes. Damage to any one cantaloupe is not serious unless it affects the edible portion or shipping quality of the individual cantaloupe or seriously detracts from the appearance thereof. Not more than ten per cent, by count, of the cantaloupes in any one container may be below the foregoing requirements, but not to exceed one-half of this tolerance shall be allowed for any one cause. Cantaloupes packed in the standard containers shall be fairly uniform in size. All cantaloupes in each container shall be of one variety or similar varietal characteristics.

B. "Mature", in the case of cantaloupes, means that the appearance of the outside indicates maturity and the arils which surround the seed during the development of maturity have been absorbed and, in addition, that the juice of the edible portion shall contain not less than eight per cent soluble solids as determined by the standard hand refractometer.

C. All containers of cantaloupes shall have appearing thereon, in plain sight and in plain letters on one outside end, the name of the person who first packed or authorized the packing of the cantaloupes, or the name under which such packer is engaged in business, together with a sufficiently explicit address to permit ready location of such packer. All cantaloupes shall be packed in regular compact arrangement in closed standard containers approved by the supervisor except as follows:

1. Cantaloupes to be used for charitable purposes or unemployment relief, or by the United States government or its agencies.

2. Any retail sales directly to a consumer.

D. As used in this section, "closed" or "lidded", as applied to containers of cantaloupes, mean:

1. In the case of fibreboard containers that the opening is completely covered, except for necessary ventilation openings, with material of similar quality and strength to the adjoining portion of the container.

2. In the case of nailed wooden, wirebound, or other containers, that forty per cent or more of the opening is covered with material similar to that used in the construction of the sides and bottom of such containers, securely attached to the top.

E. In addition to the markings required by subsections B, C and D, § 3-499, each container of cantaloupes shall be conspicuously marked in letters not less than one half of one inch in height, stating the exact number of melons packed therein. Added Laws 1965, Ch. 85, § 5.

QUESTIONS PRESENTED

Section 3-503, Arizona Revised Statutes, provides, *inter alia*, that with certain exceptions all cantaloupes grown in the State of Arizona "shall be packed in regular compact arrangement in closed standard containers approved by the supervisor. . . ." Pursuant to this statute, the appellant, who is the "supervisor" referred to by the statute, entered an order prohibiting the appellee from shipping its cantaloupes grown at Parker, Arizona,

out of the state other than in closed standard containers approved by him. The lower court has held that this order was without clear statutory basis and that it constitutes an undue burden on interstate commerce. The questions presented are:

(1) Whether, under this Court's decisions in *Federal Compress and Warehouse Co. v. McLean,* 291 U.S. 17 (1934) and *Chassaniol v. City of Greenwood,* 291 U.S. 584 (1934) the strictures of the commerce clause are even relevant, since the regulation occurs and is terminated prior to the time that the regulated goods move in interstate commerce;

(2) Whether the Arizona Fruit and Vegetable Standardization Act, as interpreted and applied by the appellant in this case, is unconstitutional as an undue burden on interstate commerce; and

(3) Whether the lower court properly held that there was no statutory basis for the appellant's order.

STATEMENT OF THE CASE

The growing of fruits and vegetables, and the marketing of these fruits and vegetables in interstate and foreign commerce, is one of the leading industries of the State of Arizona. The most important legislation governing this Arizona industry is the Fruit and Vegetable Standardization Act, whose enforcement provisions—as interpreted by the appellant, the administrative officer charged with the enforcement of the Act—the district court has held unconstitutional, at least as applied to cantaloupes.

The purpose of the Fruit and Vegetable Standardization Act is to preserve and enhance the reputation of Arizona fruits and vegetables in interstate and foreign commerce. The Act accomplishes this objective by requiring minimum standards of quality and pack for all produce subject to the Act. Different types of produce are subject to different requirements.

The prototype problem with which the Act was intended to deal is set forth in the Stipulation of Facts entered into between

the parties (hereinafter referred to as "Stipulation"). The long-run reputation which a grower of fruits and vegetables acquires is of utmost importance to the successful marketing of his fruits and vegetables from year to year. Prior to the adoption of the Fruit and Vegetable Standardization Act, growers in Arizona often found that such a reputation was impossible to achieve because of sub-standard produce shipped by other producers within the State. These growers found that poor quality and slip-shod packing practices employed by a few shippers had the effect of demeaning generally the reputation of "Arizona" fruits and vegetables. Stipulation, 3/2-26.

It was to remedy this dilemma and to enhance the reputation of Arizona fruits and vegetables in interstate and foreign commerce that the Arizona Fruit and Vegetable Standardization Act was enacted. *Ibid.*

The Act accomplishes its purposes by prescribing minimum standards and enforcement procedures with regard to two separate objectives. They are: (1) intrinsic soundness and quality of the produce itself, and (2) uniformity and compactness of packing. The parties have stipulated that "the Act has been successful in achieving its purpose." Stipulation 3/26.

As to both of these objectives, the section of the Act pertaining to cantaloupes — A.R.S. Section 3-503 — is illustrative. With regard to quality, subsections A and B of that section provide as follows:

> A. Cantaloupes shall be mature but not overripe, fairly well netted, and free from mold, decay and insect damage which has penetrated or damaged the edible portion of the cantaloupe, and free from serious damage due to bruises, sunburn, growth cracks, cuts, sponginess, flabbiness, wilting, or other causes. Damage to any one cantaloupe is not serious unless it affects the edible portion or shipping quality of the individual cantaloupe or seriously detracts from the appearance thereof. Not more than ten per cent, by count, of the cantaloupes in any one container may be below the foregoing requirements, but

not to exceed one-half of this tolerance shall be allowed for any one cause. Cantaloupes packed in the standard containers shall be fairly uniform in size. All cantaloupes in each container shall be of one variety or of similar varietal characteristics.

B. "Mature", in the case of cantaloupes, means the appearance of the outside indicates maturity and the arils which surround the seed during the development of maturity have been absorbed and, in addition, that the juice of the edible portion shall contain not less than eight per cent soluble solids as determined by the standard hand refractometer.

With regard to packing standards, A.R.S. Section 3-503 C provides as follows:

C. All containers of cantaloupes shall have appearing thereon, in plain sight and in plain letters on one outside end, the name of the person who first packed or authorized the packing of the cantaloupes, or the name under which such packer is engaged in business, together with a sufficiently explicit address to permit ready locati of such packer. All cantaloupes shall be packed in regulai ompact arrangement in closed standard containers approved by the supervisor except as follows:

1. Cantaloupes to be used for charitable purposes or unemployment relief, or by the United States government or its agencies.

2. Any retail sales directly to a consumer.

Thus, packing standards are left largely to the discretion of the supervisor, the appellant in this case. The statute is explicit, however, in its command that cantaloupes must be packed in "closed standard containers approved by the supervisor." This mandate that all cantaloupes must be packed in closed standard containers was part of a 1965 amendment. Prior to 1965, subsection G of A.R.S. § 3-503 provided that "No containers are established for unpacked or loose cantaloupes."

All enforcement of the Act is vested in the appellant, as Supervisor of Inspection. A.R.S. § 3-483.

Even after the 1965 amendment, the appellant has allowed small amounts of cantaloupes to be shipped out of the State in

bulk, and therefore not in "closed standard containers approved by the supervisor." The appellee itself was permitted to ship in bulk 400 acres of cantaloupes harvested from its Parker ranch in 1967. Stipulation, Exhibit B. Aside from this shipment, however, all of the shipments in violation of the 1965 amendment to the Act were by small shippers and in comparatively insignificant amounts. *Ibid.* As to the vast majority of cantaloupes grown in the State, the statutory mandate that cantaloupes were to be packed in closed standard containers approved by the supervisor was enforced.

The matter of enforcement of the Act pertaining to cantaloupes came to a head in 1968. Following a controversy with the appellant concerning proposed enforcement of the Act, the appellee procured the introduction of a bill in the Arizona State Legislature which would have permitted bulk shipment of vegetables and melons out of the State of Arizona to a destination not more than 25 miles beyond the state line. This bill—H.B. 170, State of Arizona, 28th Legislature, Second Regular Session—would, of course, have repealed both the requirement that cantaloupes must be packed in closed standard containers approved by the supervisor, and also the requirement that the supervisor inspect for quality defects. H.B. 170 passed the Arizona House of Representatives, but died in Committee in the Senate.

Following the defeat of the appellee's bill, the appellant sent letters to appellee and all other interested shippers informing them that he would no longer permit bulk shipments of cantaloupes out of the State.[1] This letter, dated March 22, 1968, is the "order" to which the lower court's opinion refers. Stipulation 16/30-32.

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[1] At his deposition, Mr. Pike testified that following the defeat of H.B. 170 he "could see no other alternative for me only to enforce the law." Pike Deposition, p. 56, lines 12 and 13. The deposition of the appellant, Mr. L. J. Pike, and the deposition of Mr. David Gipe, General Manager of the Arizona operations of the appellee, were incorporated into and made part of the Stipulation of Facts. Stipulation, 24/25-25/3.

The appellee reacted to the appellant's letter by preparing and filing this action, asking for declaratory judgment that the Arizona Fruit and Vegetable Standardization Act as interpreted and applied by the appellant was unconstitutional. The complaint also sought injunctive relief against enforcement of the Act as ordered by appellant. The complaint alleged that the appellant's order constituted an undue burden on interstate commerce, and that it was inconsistent with the Agricultural Adjustment Act, 48 Stat. 31 et seq., 7 U.S.C. § 601 et seq. and other federal law.

The appellee is a multi-million dollar farming corporation, one of the largest and most successful fruit and vegetable growers in Arizona and California. At its Parker operation alone, the appellee has spent more than three million dollars in capital improvements in preparing some 6,400 acres of land for farming under lease from the Colorado River Indian Tribes. Stipulation 6/24-32; 7/27-30. In all, the appellee farms between 25,000 and 30, 000 acres. *Id.* at 6/5-6.

The parties stipulated at the oral argument before the district court that cantaloupes can be inspected for the defects proscribed by the statute only at the packing stage. See Transcript of Oral Argument before district court, pages 70-71. It is, of course, impossible to inspect for uniformity and compactness of pack unless the inspector can inspect the packing process and the containers in their final packed form; hence the statutory requirement that cantaloupes be packed in "closed standard containers approved by the supervisor." Similarly, inspection for quality defects at any stage of the preparation of cantaloupes for market, other than the packing stage, would be inordinately disruptive to the shipper's operations and impossible for the inspector to accomplish. Inspection of cantaloupes to determine compliance with standardization laws simply is not carried out in this State or any other State except at the time that the cantaloupes are being sorted and packed. And the sorting and packing must be accomplished at the packing shed.

Therefore, if the Arizona Supervisor of Inspection is to enforce the standards of the Fruit and Vegetable Standardization Act relative to cantaloupes at all, he must do so by inspection at the time the cantaloupes are packed within Arizona. If they are packed outside the State of Arizona they cannot be inspected by the Supervisor because they are outside his jurisdiction.

Under present technology, it is not commercially feasible to pack cantaloupes except in a packing shed. Gipe Deposition 10/8-13. The appellee does not have a packing shed at its Parker Ranch. Stipulation 9/15-18. At the time this suit was filed, it had leased a packing shed in Blythe, California, some thirty miles from Parker. *Id.* at 12/18-20. The lease expired in November of 1968. *Id.* at 22/28.

The problem from the appellee's standpoint is thus strictly an economic one: under the Act, appellee cannot ship its cantaloupes unless they have been inspected; they cannot be inspected by the appellant unless they are packed in Arizona; and they cannot be packed except in a packing shed. However, this Court has made it very clear in many cases that the mere fact that State regulation results in greater expense to a profit-making corporation is not sufficient to invalidate the State regulation on commerce clause grounds.[2]

Moreover, in the instant case the economic impact to the appellee is minimal. The leased facilities at Blythe will be inadequate for the appellee's anticipated acreage at Parker in any event, and appellee plans to build its own shed either in Arizona or California. The appellee has considered that matter but has not yet decided whether to build in Arizona or California. Gipe Deposition 54/9-55/5. The cost of a shed sufficient to serve appellee's anticipated acreage is approximately $200,000, (*Id.* at 54/10) which is less than one third the value of one cantaloupe crop for one year. Stipulation, 8/22-23.

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[2] *South Carolina State Highway Dept. v. Barnwell Bros.*, 303 U.S. 177 (1938); *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959); and *Southern Pacific Company v. Arizona*, 325 U.S. 761 (1945).

A three judge federal district court was convened to determine the issues in the case, and on June 7, 1968 that court (1) entered a preliminary injunction preventing the appellant from enforcing his order as to the appellee's 1968 cantaloupe crop; (2) instructed the parties to enter into a stipulation of facts; and (3) set the matter down for argument on the legal issues.

Following the preparation and filing of a stipulation of facts and the parties' briefs, the case was argued on November 15, 1968.

On January 29, 1969, the court filed an opinion ruling in appellee's favor, but the ground of the ruling was unclear. The appellant filed a "Motion for Rehearing and/or Clarification," and on March 10, 1969 the court filed a new decision granting the judgment from which this appeal is taken. The court in its second opinion held for the respondent on two independent grounds: (1) the court said that it could find "no clear basis nor authority" in the statute for the appellee's order that cantaloupes not be shipped outside the State in bulk, and (2) the court held that, in any event, the order constituted an unconstitutional burden on interstate commerce.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

Any time that any aspect of an important state statute is declared unconstitutional by a federal court, the issue can hardly be said to be anything but substantial. Similarly, whenever a three judge federal district court interprets an important state statute in such a way as to effectively render it unenforceable, and the only appeal from that interpretation is to this Court, the issue is substantial. In the instant case, the lower court has done both.

The substantiality of the federal issue is compounded in the instant case by the fact that the lower court's holding has cast a shadow not only over the enforcement procedures of Arizona's Standardization Act, but also over those of all other states which have adopted standardization laws in an attempt to enhance the long-run reputation of their states' produce. The lower court's

handling of the constitutional aspect of its decision is cryptic in the extreme, but at the very minimum, the district court has necessarily held that where enforcement of a state's agricultural standardization laws would be impossible without requiring possible expenditures of money by certain farming corporations, enforcement of standardization laws under such circumstances is unconstitutional. Thus, the potential impact of the decision extends far beyond the enforceability of Arizona's standardization laws pertaining to cantaloupes.[3]

The district court's assertion that it could find no clear statutory basis for the appellant's action is completely without foundation. It would be difficult to draft a statute in any more clear terms than those which were used by the Arizona Legislature: "All cantaloupes shall be packed in regular compact arrangement in closed standard containers approved by the supervisor. . . ."

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[3] Virtually every important agricultural state in the nation has a standardization act of some kind.

Arizona's Standardization Act was patterned after the California Act and the provisions of the two acts are still similar, though their standards differ in various respects.

For examples of standardization acts of other states, see the following:

California—West's Annotated California Codes, Agricultural Code, Division 17.
Colorado—Colorado Revised Statutes (1963), Chapter 7.
Florida—Florida Statutes Annotated (1962), Title 33.
Idaho—Idaho Code (1968), Title 22.
Illinois—Smith-Hurd Illinois Annotated Statutes (1966), Chapter 5.
Indiana—Burns Indiana Statutes (1964), Title 15.
Iowa—Iowa Code (1949), Title 10.
Mississippi—Mississippi Code (1942), Title 19.
Montana—Revised Codes of Montana (1947), Title 3.
Nevada—Nevada Revised Statutes (1963), Title 51.
New Mexico—New Mexico Statutes (1953), Chapter 45.
Ohio—Page's Ohio Revised Code (1953), Title 9.
Oregon—Oregon Revised Statutes (1953), Title 49.
Tennessee—Tennessee Code (1954), Title 43.
Utah—Utah Code (1953), Title 4 and Title 5.
Washington—Revised Code of Washington (1962), Title 15.
Wyoming—Wyoming Statutes (1957), Title 11.

Under certain circumstances, this Court has observed that it is "hesitant to overrule decisions by Federal courts skilled in the law of particular states [concerning the meaning of state law] unless their conclusions are shown to be unreasonable." *Propper v. Clark,* 337 U.S. 472, 486-487 (1949). In the instant case, however, the interpretation of the lower court is not the product of skill in the law of the State of Arizona; the court's view of the statute is refuted by the language of the statute itself.[4]

In the instant case, the governing rule of statutory interpretation is that which prescribes that "When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agencies charged with its administration." *Udall v. Tallman,* 380 U.S. 1, 16 (1965). *Udall v. Tallman* arose in the context of a federal statute, but the principle is equally applicable to interpretation of state statutes, particularly where upsetting the administrative officer's interpretation is potentially as disruptive as in the instant case.

If the lower court had bottomed its holding solely on the ground that it could find no statutory basis for the appellant's order, then there might be some question to the substantiality of the federal issue. In such event, the appellant would have an alterna-

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[4] Had the court given any indication at the argument stage that it was considering basing its judgment on a statutory interpretation ground, or had the appellee pressed this point either in its briefs or at the oral argument, the appellant might have requested the lower court to abstain in order to allow opportunity for the state courts to pass on this issue. The abstention issue was neither briefed nor argued for the obvious reason that at the argument stage no one thought that interpretation of the statute was at issue. The lower court itself obviously questioned its procedure in holding that there was no statutory basis for appellant's order, since it devoted most of its opinion to the question of abstention. At this stage of the proceedings, we do not feel that abstention should now be an issue. The district court has ruled on the constitutional issue and its ruling would obviously be the same even after a state court declared that the statute means what it says. We therefore feel that this Court should proceed to a review of the lower court's determination on the constitutional issue.

tive remedy before the Arizona State Legislature.[5] The lower court went further, however, and clearly held, as an independent ground for its judgment, that the appellant's order is unconstitutional. Therefore, even if the Legislature were now to amend the statute, the holding as to constitutionality would remain. And unless that holding is reviewed by this Court within the time permitted by this Court's rules, it will become *res judicata,* and might preclude any future review by this or any other court in a suit involving this appellant testing the constitutionality of Arizona law which prevented the appellee from shipping its cantaloupes outside the State of Arizona without first being inspected for quality and packing standards.

Finally, because this case is one of those which, by statute, must be determined by a three judge court, unless the lower court's holding is reviewed by this Court, there will be no appellate review at all. At the very least, the issues raised by the lower court's judgment are too important to be both the first and the last word on the matter.

REASONS WHY PROBABLE JURISDICTION SHOULD BE NOTED

The holding of the lower court that the Act as interpreted and enforced in this case is unconstitutional is out of harmony with this Court's decisions in *Cooley v. Board of Port Wardens,* 12 How. 299 (1851); *South Carolina State Highway Dept. v. Barnwell Bros.,* 303 U.S. 177 (1938); *Brotherhood of Locomotive Firemen & Enginemen v. Chicago, Rock Island & Pacific Railroad Co.,* ____ U.S. ____, 89 S.Ct. 323 (1968), and others It is squarely inconsistent with *Federal Compress and Warehouse Co. v. McLean,* 291 U.S. 17 (1934) and *Chassaniol v. City of Greenwood,* 291 U.S. 584 (1934) on the issue of whether in the present context a regulation of the packing of fruits and

[5] It is doubtful, however, that the intent of the Arizona legislature could have been made any more clear, in light of the plain language of its 1965 amendment, and its rejection of H.B. 170, proposed by the appellee in 1968.

vegetables involves a regulation of interstate commerce and with *Sligh v. Kirkwood,* 237 U.S. 52 (1915), on the burden on commerce issue. Because these latter three cases are squarely on point, a brief discussion of their facts and holdings is warranted. None of them was even mentioned by the lower court.

The commerce clause is not applicable to the facts of this case under this Court's decision in *Federal Compress and Warehouse Co. v. McLean,* 291 U.S. 17 (1934) and *Chassaniol v. City of Greenwood,* 291 U.S. 584 (1934).

The *McLean* case upheld the constitutionality of a tax imposed by the State of Mississippi upon a cotton warehouse and compress business located within that State. According to stipulated facts, cotton was purchased within Mississippi for resale or to fulfill contracts for sale outside of Mississippi. After the cotton was purchased and ginned, it was transported to the appellant's warehouse for storage, whereupon negotiable warehouse receipts were issued to the owners of the cotton.

The sequence of events occurring after the cotton was stored in the warehouse is of great significance for purposes of the present issue. After the holders of the warehouse receipts had given orders to the warehouse company to ship the cotton, the cotton was compressed. The compression process was a process which occurred only after shipping orders had been received, the purpose of compression being to prepare the cotton for shipment. All except a negligible part of the cotton was shipped to points outside the state. In the language of the Court:

> Upon shipping orders given by the holders of the warehouse receipts, appellant compresses the cotton into bales of standard weight and size, suitable for shipment, and delivers them to the rail carrier for interstate transportation. 291 U.S. at 20.

The appellants argued that the tax upon the business both of warehousing and of compressing the cotton was a forbidden burden upon interstate commerce. In rejecting that contention, this Court held that of the overall continuum of events which

eventually culminated in interstate sale, the compression and warehousing stages did not involve interstate commerce so as to bring into play the question of the constitutionality of the state regulation. The Court's opinion states as follows:

> It is clear that by all accepted tests the cotton, while in appellant's warehouse, has not begun to move in interstate commerce immune from local taxation. When it comes to rest there, its intrastate journey, whether by truck or by rail, comes to an end, and, although in the ordinary course of business the cotton would ultimately reach points outside the state, its journey interstate does not begin, and so it does not become exempt from local tax until its shipment to points of destination outside the state. Before shipping orders are given, it has no ascertainable destination without the state, and in the meantime, until surrender of the warehouse receipts, it is subject to the exclusive control of the owner. Property thus withdrawn from transportation, whether intrastate or interstate, until restored to a transportation movement interstate, has often been held to be subject to local taxation. Coe v. Errol, 116 U.S. 517, 6 S.Ct. 475, 29 L.Ed. 715; Bacon v. Illinois, 227 U.S. 504, 33 S.Ct. 299, 57 L.Ed. 615; General Oil Co. v. Crain, 209 U.S. 211, 28 S.Ct. 475, 52 L.Ed. 754; Susquehanna Coal Company v. South Amboy, 228 U.S. 665, 669, 33 S.Ct. 712, L.Ed. 1015; State of Minnesota v. Blasius, 290 U.S. 1, 54 S.Ct. 34, 78 L.Ed. 131, decided November 6, 1933; cf. Arkadelphia Milling Co. v. St. Louis Southwestern R. Co., 249 U.S. 134, 39 S.Ct. 237, 63 L.Ed. 517.
>
> A nondiscriminatory tax upon the business of storing and compressing the cotton, which is not itself the subject of a movement in interstate commerce, is not forbidden. *Most articles, before their shipment in interstate commerce, have had work done upon them which adapts them to the needs of commerce and prepares them for safe and convenient transportation, but that fact has never been thought to immunize from local taxation either the articles themselves or those who have manufactured or otherwise prepared them for interstate transportation.* American Manufacturing Co. v. St. Louis, 250 U. S. 459, 39 S. Ct. 522, 63 L. Ed 1084; Crescent Cotton Oil Co. v. Mississippi, 257 U.S. 129, 42 S. Ct. 42, 66 L. Ed. 166; Oliver

Iron Mining Co. v. Lord, 262 U. S. 172, 43 S. Ct. 526, 67 L. Ed. 929; Hope Natural Gas Co. v. Hall, 274 U.S. 284, 47 S. Ct. 639, 71 L. Ed. 1049; Utah Power & Light Co. v. Pfost, 286 U.S. 165, 52 S. Ct. 548, 76 L. Ed. 1038. Here the privilege taxed is exercised before interstate commerce begins; hence the burden of the tax upon the commerce is too indirect and remote to transgress constitutional limitations. See Nashville, Chattanooga & St. Louis Railway Co. v. Wallace, 288 U. S. 249, 53 S.Ct. 345, 77 L. Ed. 730. The case, therefore, stands on a footing different from those in which local regulations of the business of purchasing a commodity within and shipping it without the state have been deemed to impede or embarrass interstate commerce in those commodities. Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282, 42 S.Ct. 106, 66 L.Ed. 239; Lemke v. Farmers' Grain Co., 258 U.S. 50, 42 S.Ct. 244, 66 L.Ed. 458.

291 U.S. at 21-22. (Emphasis added)

The same problem dealt with by Mr. Justice Stone in the *McLean* case was also the subject of a unanimous opinion authored for the Court by Mr. Justice Brandeis one month later in *Chassaniol v. City of Greenwood, Miss.*, 291 U.S. 584 (1934), a case involving the same basic fact situation as *McLean*. The *Chassaniol* opinion states as follows:

Chassaniol contends that all the cotton is in interstate or foreign commerce from the moment it leaves the gin for Greenwood, or at least from the moment it is purchased at Greenwood by the buyer. The argument is that already at that time the cotton is destined for ultimate shipment to some other state or country; and that to tax the occupation of the cotton buyer burdens interstate commerce, since the buyer at Greenwood is the instrumentality by which the interstate transaction is initiated. The business involved is substantially like that described in Federal Compress & Warehouse Co. v. McLean; and the rule there declared must govern here. *Ginning cotton, transporting it to Greenwood, and warehousing, buying, and compressing it there, are each, like the growing of it, steps in preparation for the sale and shipment in interstate or foreign commerce. But each step prior to the sale and shipment is a transaction local to Mississippi, a transaction in intrastate com-*

merce. Hence those engaged in performing any such local function may be subjected to an occupation tax, just as the property used, or processed, by them may be subjected to a property tax.

291 U.S. at 586-587. (Emphasis added)

The *McLean* and *Chassaniol* decisions are squarely on point. The packing of fruits and vegetables, like the compression of cotton, occurs prior to shipment in interstate commerce. As those cases make very clear, "each step prior to the sale and shipment is a transaction local to [the state where the transaction occurs]." *Ibid.* It makes no difference that shipment may occur a short time after packing. In the *McLean* case compression occurred only after shipping orders were given; compression was the step which immediately preceded shipment. And in *Chassaniol* the Court pointed out that "when [the buyer] buys he customarily has in hand and in mind orders or contracts for that particular grade for immediate or future delivery in other states or countries to the extent of about ninety per cent, on the average, of all cotton purchased by him." 291 U.S. at 586. Nevertheless, the Supreme Court unanimously rejected the contention that ". . . all the cotton is in interstate or foreign commerce . . . at least from the moment it is purchased at Greenwood by the buyer." *Ibid.*

Sligh v. Kirkwood, 237 U.S. 52 (1915), upheld the constitutionality of a Florida statute making it unlawful for anyone to sell, offer for sale, ship or deliver for shipment, any citrus fruits which were immature or otherwise unfit for human consumption. In dealing with the issue of the scope of state police powers, the Court quoted from *Eubank v. Richmond,* 226 U.S. 137 (1912), "It [the state police power] extends, we have said, not only to regulations which promote the public health, morals, and safety, but to those which promote the public convenience or the general prosperity." 226 U.S. at 142.

It was contended in the *Sligh* case — as the appellee has contended in this case — that the regulation of fruits which were

destined for sale in states other than the State of Florida was not a legitimate concern of the State of Florida and not properly within its police powers. This Court's opinion refuting that contention states as follows:

> We may take judicial notice of the fact that the raising of citrus fruits is one of the great industries of the State of Florida. It was competent for the legislature to find that it was essential for the success of that industry that its reputation be preserved in other states wherein such fruits find their most extensive market. The shipment of fruits so immature as to be unfit for consumption, and consequently injurious to the health of the purchaser, would not be otherwise than a serious injury to the local trade, and would certainly affect the successful conduct of such business within the state. *The protection of the state's reputation in foreign markets, with the consequent beneficial effect upon a great home industry, may have been within the legislative intent, and it certainly could not be said that this legislation has no reasonable relation to the accomplishment of that purpose.*
>
> 237 U.S. at 61-62. (Emphasis added)

We submit that the foregoing language from the *Sligh* opinion, and the holding of that case, are completely dispositive of the same issues in the instant case. If Florida, in 1915—in the interest of maintaining the reputation of its citrus industry as a whole—can prevent the shipment of immature citrus fruits in interstate commerce, then Arizona, in 1968, can surely prescribe standards of quality, appearance, packing and marketability for cantaloupes to be shipped in interstate commerce, and can prevent any cantaloupes from leaving this State which do not comply with those standards.

The holding and the rationale of *Sligh v. Kirkwood* are consistent with a long line of this Court's decisions, reaching back to the leading case of *Cooley v. Board of Port Wardens*, 12 How. 299 (1851). The landmark principle laid down by *Cooley* was the following:

Now, the power to regulate commerce, embraces a vast field,

> containing not only many, but exceedingly various subjects, quite unlike in their nature; some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port; and some, like the subject now in question, as imperatively demanding that diversity, which alone can meet the local necessities of navigation.
>
> 12 How. at 319.

From a functional standpoint, the issue of uniformity versus diversity requires an inquiry into whether there is any adverse impact upon interstate commerce resulting from the fact that different states may enact different laws pertaining to fruit and vegetable standardization. Unlike the mud guard requirements in *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959), the weight and width restrictions in *South Carolina State Highway Dept. v. Barnwell Bros.*, 303 U.S. 177 (1938), and the train length limitations in *Southern Pacific Company v. Arizona*, 325 U.S. 761 (1945), the differences between the instant law and the laws of sister states are not themselves impediments to commerce. In *Bibb*, *Barnwell* and *Southern Pacific*, interstate shippers found themselves obligated, upon entering the state at issue, to go to great expense and trouble solely because of the differences in state laws. Interstate truckers, for example, upon entering the State of Illinois prior to the *Bibb* case, had to install new mud guards. In *Barnwell*, interstate truckers, upon reaching the South Carolina state line, found themselves obligated either to reload their cargo onto other trailers or go around the State of South Carolina. And in *Southern Pacific Company v. Arizona*, interstate railroads had to shorten the size of their passenger and freight trains at El Paso and Los Angeles because of the *differences* between the Arizona law and the laws of its sister states.

The Arizona Fruit and Vegetable Standardization Act, by contrast, has its first and final impact on goods which originate within this State before they ever enter any other state. Once these goods cross a state line, there is no further impediment to their

interstate journey because of any differences in standardization laws.

The instant case is therefore the clearest possible example of a case which falls on the permissible side of the *Cooley* dividing line: There is no adverse impact whatever upon interstate commerce as a result of *differences* between Arizona's standardization laws and the standardization laws of other states. By the time Arizona fruits and vegetables become a part of the flow of interstate commerce, they do so completely free from any regulation under the Act at issue.

The cases on this issue since *Cooley v. Board of Port Wardens,* culminating as recently as last year in *Brotherhood of Locomotive Firemen & Enginemen v. Chicago, Rock Island & Pacific Railroad Co.,* ____ U.S. ____, 89 S.Ct. 323 (1968) have made it very clear that so long as the regulation at issue involves a legitimate exercise of the state police power, and falls within an area of sate competence to regulate, federal courts will be very reluctant to hold the statute unconstitutional on commerce clause grounds. In the instant case, both the legitimacy of the state interest, and the ultimate commerce clause issue, are squarely resolved by this Court's decision in *Sligh v. Kirkwood.*

The only clues to the basis for the lower court's holding that "the order complained of constitutes an unlawful burden upon interstate commerce" can be found in the cases which the court cites in support of this holding: *Foster Fountain Packing Co. v. Haydel,* 278 U.S. 1 (1928); *Johnson v. Haydel,* 278 U.S. 16 (1928); *Shafer v. Farmers Grain Co.,* 268 U.S. 189 (1925); *Lemke v. Farmers Grain Co.,* 258 U.S. 50 (1922).

The opinion is devoid of any discussion of the court's view of the significance of these cases. The court apparently felt, however, that *Lemke* and *Shafer* were pertinent to the issue of whether commerce clause strictures applied to a state regulation imposed at a processing stage prior to the beginning of the interstate journey, and that the *Haydel* cases were relevant to the

burden on commerce issue. Examination of those cases reveals that the court's reliance upon them is misplaced.

Lemke and *Shafer* both struck down regulations imposed upon the purchase of grain stored in elevators for immediate shipment outside of the state without any resale or processing prior to such shipment. Dictum in the *Lemke* case refers to the "time when goods begin their interstate journey by delivery to a carrier or otherwise . . ." (285 U.S. at 55), apparently regarding delivery to an elevator as being tantamount to delivery to a carrier. Those cases were distinguished by *Parker v. Brown,* 317 U.S. 341, 361 (1943) on the ground that the purchase of wheat involved in those cases was "for shipment out of the state without resale or processing. . . ."

Lemke and *Shafer* both preceded the unanimous holdings in *McLean, Chassaniol,* and *Parker v. Brown.* Therefore, to whatever extent there is inconsistency between *Lemke* and *Shafer* on the one hand, and *McLean, Chassaniol,* and *Parker v. Brown* on the other hand, the former have been overruled. We submit that there is no inconsistency, and that the dividing line established by all of these cases rests upon whether the regulation occurs at a point which involves some processing prior to shipment. Regulation of the pre-processing stages, such as the compression of cotton, and the packaging of fruits and vegetables, occurs prior to the time that the produce has begun its interstate journey. The state of origin can impose its police power regulations at these stages free from commerce clause strictures. The commerce clause comes into play at the time that the goods are delivered either to a carrier or to an elevator for shipment without resale or processing.

The court's reliance on *Foster Fountain Packing Co. v. Haydel,* 278 U.S. 1 (1928) and *Johnson v. Haydel,* 278 U.S. 16 (1928), is misplaced because of a dispositive factual difference between those cases and the instant case. Those cases held unconstitutional a Louisiana statute requiring that the hulls and heads be removed

from shrimp taken in Louisiana before they were shipped out of the state. The State of Louisiana asserted that the purpose of the statute was to preserve the hulls and heads for Louisiana use. There simply was no basis for this contention. The Court observed that, "Not more than half the hulls and heads removed in Louisiana is used for any purpose. They have no market value, cannot be sold or given away, and often constitute a nuisance." 278 U.S. at 9. Under these circumstances, the Court concluded that the ". . . provisions of the act to be restrained show that the conservation of hulls and heads is a feigned and not the real purpose." 278 U.S. at 10.

The principle of the *Haydel* cases is simple and salutary, but totally inapposite to the instant case: Where the asserted state interest is merely a sham, or a facade behind which the state attempts to keep within its own borders certain aspects of commerce, such as the packing business, such a practice is invalidated by the commerce clause. Cf. *Baldwin v. Seelig,* 294 U.S. 511 (1935); *Toomer v. Witsell,* 334 U.S. 385 (1948); *Polar Ice Cream & Creamery Co. v. Andrews,* 375 U.S. 361 (1964). The dispositive fact in the *Haydel* cases was that there was simply no proper state purpose which could be ascribed to the regulation; consequently, this Court concluded that the real purpose had to be to immunize the Louisiana shrimp packing business from out-of-state competition.[6]

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[6] In fact, there is a local industry within the State of Arizona which is very much concerned over the lower court's holdings. It is not, however, the packing industry; it is the Arizona Vegetable Growers Association. Both before the lower court, and also before this Court, counsel for the Arizona Vegetable Growers Association have been associated with the State Attorney General's office, at the expense of the Arizona Vegetable Growers Association, to defend the constitutionality and enforceability of the Fruit and Vegetable Standardization Act. The members of this Association are in the business of producing and marketing Arizona fruits and vegetables. They have seen the great benefits which have come to their industry over the years through the enforcement of minimum uniform standards of quality and pack applicable to all fruits and vegetables shipped from the State of Arizona.

In the instant case, by contrast, the parties have stipulated that the purpose of the Act is to promote the reputation of Arizona fruits and vegetables in interstate commerce. The legitimacy of this interest is squarely established by the unanimous holding of this Court in *Sligh v. Kirkwood.* Therefore, the governing cases are not the Louisiana shrimp packing cases, but rather *Sligh v. Kirkwood, Cooley v. Board of Port Wardens, South Carolina v. Barnwell,* and *Brotherhood of Locomotive Firemen & Enginemen v. Chicago, Rock Island & Pacific Railroad Co.*

This Court has made it very clear that if there is a proper and legitimate purpose for state regulation, Federal Courts will not hold that the true purpose of the regulation is one which would render it unconstitutional. *Daniel v. Family Security Life Ins. Co.,* 336 U.S. 220 (1949). In fact, the purpose of the Arizona Fruit and Vegetable Standardization Act is and always has been to "promote the development of the Arizona fruit and vegetable industry in interstate and foreign markets. . . ." Preamble to Chapter 95, 8th Legislature, State of Arizona (1929). The district court has declared that it has not held the entire Act unconstitutional, referring to "the legitimate interests of the State of Arizona." The lower court has, however, held unconstitutional the enforcement procedures of the Act by precluding inspection by Arizona Inspectors to determine whether the standards of the Arizona Act have been met. This, we submit, is equally disruptive to "the legitimate interests of the State of Arizona," as well as those of many other states, and raises substantial federal issues which merit at least one appellate review.

CONCLUSION

The lower court's cryptic treatment of the constitutional issues does not even mention *Sligh v. Kirkwood, Cooley, McLean* and *Chassaniol,* even though they were extensively briefed and argued. Indeed, the lower court's opinion is completely devoid of any reasoning or guidelines which the appellant might use as the basis for determining how he might properly, if at all, go about implementing what the lower court's opinion concedes to be "legitimate interests of the State of Arizona." Accepting the lower court's premise that Arizona does have a legitimate interest in enforcing its Fruit and Vegetable Standardization Act, the appellant is at a complete loss to know how to achieve these interests in light of the court's opinion.[7]

It is not possible for the appellant to make his inspection to determine whether quality standards have been met at any stage of the preparation of cantaloupes for marketing other than at the packing stage. Therefore, unless the appellant is free to enforce his order requiring that cantaloupes be packed in the State of Arizona, he has no way of assuring himself that the quality standards for Arizona cantaloupes specified by the statute, e.g. that "cantaloupes shall be free from mold, decay and insect damage . . . and free from serious damage due to bruises, sunburn, growth cracks, cuts, sponginess, flabbiness, wilting," etc. have been met, because there is no way that he can inspect cantaloupes for these defects once they have left the state. Similarly, the ap-

[7] The principal thrust of the appellee's position taken before the lower court was that Arizona's interests would be vindicated because of the appellee's announced intention to pack its cantaloupes in California, which also has a Fruit and Vegetable Standardization Act. In the first place, the standards of the two Acts pertaining to cantaloupes are not identical. Even more important, it would seem elementary that Arizona is entitled to enforce its own law through its own inspectors. It would indeed be a hollow right if Arizona is entitled to enact standardization laws, but must depend for their enforcement upon the enforcement officers of a sister state. The existence or non-existence and similarity or lack of similarity of a standardization law in California are therefore irrelevant.

pellant is powerless to carry out his statutory responsibility to assure that all cantaloupes are packed in closed, standard containers approved by him if the packing, in fact, occurs outside the State of Arizona.

The appellant finds himself in this dilemma: unless the decision of the lower court is reviewed by this Court, it will not be reviewed at all, and appellant will be left with a judgment and opinion which assures him that Arizona has a legitimate interest in enforcing its Fruit and Vegetable Standardization Act, but without any means of ascertaining how he may go about enforcing that Act.

It is respectfully submitted that the issues in this case are substantial, and that the appellant is entitled to an appellate review of the lower court's judgment. Accordingly, we urge that jurisdiction be noted.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

BRUCE CHURCH, INC., a California corporation,

Plaintiff,

vs.

L. J. PIKE, as Supervisor of Inspection the Arizona Fruit and Vegetable Standardi tion Service, et al.,

Defendants.

No. Civ-6702 Phx.
OPINION AND ORDER

CRAIG, D. J.

The within action was instituted by plaintiff, Bruce Church, Inc., a California corporation, against L. J. Pike, as Supervisor of Inspection of the Arizona Fruit and Vegetable Standardization Service, and others.

Plaintiff is engaged in extensive agricultural operations, including the growing, harvesting, packaging and shipping of agricultural products in California and Arizona.

In 1964 plaintiff entered into a lease with the Secretary of the Interior, the Commissioner of Indian Affairs, the Colorado River Indian Agency and the Colorado River Indian Tribes under the terms of which plaintiff undertook, at substantial expense, to develop 6,400 acres of unimproved land in the Colorado River Indian Reservation near Parker, Arizona. Plaintiff does not have packing facilities at Parker and at least in the foreseeable future apparently had no intention of developing packing facilities at that location for the reason that it had adequate facilities at Blythe, California, some 31 miles distant, which could be economically used in sorting, grading, packing

and shipping the produce grown and harvested on the Arizona side of the river. It was plaintiff's intention and practice to harvest its melons grown in the Parker area, to load them in trailers and to haul the bulk load to plaintiff's packing facilities at Blythe, where the melons were sorted, inspected, packed and shipped.

Title 3, Chapter 3, Article 4, Arizona Revised Statutes, constitutes the Arizona Fruit and Vegetable Standardization Act (§§ 3-481 et seq., A.R.S.). § 3-483 of the Act provides for the creation of the office of Supervisor of Inspection, charged with the responsibility of enforcing the provisions of the Act. Defendant Pike currently holds that position. The Arizona Act includes certain requirements with respect to containers, labeling, inspecting, grading, licensing, etc., and provides certain sanctions for failure to comply with the provisions of the Act or the Rules and Regulations promulgated thereunder.

In March, 1968, defendant Pike, acting in his official capacity and under his interpretation of the Fruit and Vegetable Standardization Act, *supra,* notified plaintiff that no future transportation of bulk shipments of cantaloupe harvested by plaintiff would be allowed out of the State of Arizona to the plaintiff's packing facilities at Blythe, California.

Under the provisions of Article 1, § 8 of the United States Constitution (Commerce Clause) and Article 6 of the United States Constitution (Supremacy Clause) and pursuant to the provisions of Title 28 U.S.C. § 2201, plaintiff instituted this action questioning the constitutionality of the Arizona Fruit and Vegetable Standardization Act, *supra,* insofar as its enforcement by defendant Pike under his interpretation of the Act constitutes an unreasonable and unlawful burden upon interstate commerce. This Court has jurisdiction by virtue of Title 28 U.S.C. § 1331 and Title 28 U.S.C. § 1332.

The complaint questions the constitutionality of a state statute. Consequently, Three Judge Court was convened pursuant to

Title 28 U.S.C. §§ 2281, 2284. In order to conserve the crop then being harvested, a temporary restraining order was issued by this Court and continued by stipulation until a hearing on the merits on June 7, 1968.

A temporary injunction issued from this Court pending ultimate determination of the issues, which injunction restrained the defendant Pike from further acts of deterrence with respect to plaintiff's bulk shipments of melons from its farms in Arizona to its packing plant in California.

The parties have entered into an agreed statement of facts as to which this Court has taken notice. The parties have submitted memoranda in support of the respective positions of the parties.

We are first confronted with the question as to whether the abstention doctrine should be invoked in this case. To paraphrase the question propounded by the United States Supreme Court in *Burford v. Sun Oil Co.*, 319 U.S. 315, 318, 63 S.Ct. 1098, 1099, and quoted in *Alabama Public Service Commission v. Southern Railway Co.*, 341 U.S. 341, 71 S.Ct. 762:

> "Assuming that the federal district court had jurisdiction, should it, as a matter of sound equitable discretion, have declined to exercise that jurisdiction here?"

Many cases involving Three Judge Courts with jurisdiction predicated upon both the presence of a federal question and diversity of citizenship have invoked the abstention doctrine. *See Harrison v. NAACP*, 360 U.S. 167, 79 S.Ct. 1025; *Alabama Public Service Commission v. Southern Railway Co., supra.* The issue here is whether this case presents a situation in which this Court should exercise the power of abstention. Apparently there is no clear cut rule existing to guide a Court in making this determination. Certain criteria, however, appear in existing decisions that indicate when it is appropriate to exercise the power of abstention. In *Harrison, supra,* the Court stated:

"This now well-established procedure is aimed at the avoidance of unnecessary interference by the federal courts with proper and validly administered state concerns, a course so essential to the balanced working of our federal system. To minimize the possibility of such interference a 'scrupulous regard for the rightful independence of state governments * * * should at all times actuate the federal courts,' (authorities cited) as their 'contribution * * * in furthering the harmonious relation between state and federal authority * * *.' (authorities cited) In the service of this doctrine, which this Court has applied in many different contexts, no principle has found more consistent or clear expression than that the federal courts should not adjudicate the constitutionality of state enactments fairly open to interpretation until the state courts have been afforded a reasonable opportunity to pass upon them. (authorities cited) This principle does not, of course, involve the abdication of federal jurisdiction, but only the postponement of its exercise; it serves the policy of comity inherent in the doctrine of abstention; and it spares the federal courts of unnecessary constitutional adjudication. (authorities cited)"

A recent discussion of the abstention doctrine in *Zwickler v. Koota,* 88 S.Ct. 391, 395, states that the power should be exercised "only in narrowly limited 'special circumstances'." Among the "special circumstances" noted in *Zwickler* are (1) the susceptability of a state statute to a construction by the state courts that would aovid or modify constitutional questions before the federal court, and (2) the possibility that adjudication would disrupt state administrative processes. In *Zwickler* neither of these "circumstances" was present, and the court held, therefore, that it was error for the district court to apply the doctrine. The court found application of the doctrine inappropriate where plaintiff attacked a state statute on its face as being repugnant to the First Amendment. We do not believe the instant case an appropriate one to invoke the abstention doctrine.

The Arizona Fruit and Vegetable Standardization Act has never been constitutionally construed by the Arizona courts, nor

do we believe it necessary to the disposition of this case to determine the constitutionality of that Act. Moreover, a present adjudication of this case through constitutional interpretation might well disrupt the legitimate interests of the State of Arizona.

A reading of the Act reveals no clear basis nor authority for the issuance of the order by the defendant, Supervisor of Inspection of the Arizona Fruit and Vegetable Standardization Service, which order has been attacked by the plaintiff in this case. The constitutionality of the Act, then, is not in question. What is in question is the construction placed upon the Act by the Superintendent and the constitutionality of the order issued by him pursuant to his construction.

A review of the agreed statement of facts and the Act in question indicates that the order complained of constitutes an unlawful burden upon interstate commerce. *See Foster Fountain Packing Co. v. Haydel,* 278 U.S. 1, 49 S.Ct. 1; *Johnson v. Haydel,* 278 U.S. 16, 49 S.Ct. 6; *Schafer v. Farmers Grain Co.,* 268 U.S. 189, 45 S.Ct. 481; *Lemke v. Farmers Grain Co.,* 258 U.S. 50, 42 S.Ct. 244. If the application of the Arizona Fruit and Vegetable Standardization Act, as interpreted by the Supervisor of Inspection, could be construed to be a valid interpretation and application of the statute, then the statute so interpreted and applied is unconstitutional.

WHEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the injunction heretofore issued restraining the defendant, L. J. Pike, his deputies, agents, servants, employees and attorneys and all persons in active concert and participation with them from in any manner, either directly or indirectly, threatening, ordering, attempting or acting (a) to hinder, interfere with, impede, restrain, prohibit or prevent plaintiff from harvesting its crops of cantaloupe grown by plaintiff in the State of Arizona, in the vicinity of Parker, Arizona, and from transporting said cantaloupe in bulk into the State of California; (b)

to seize and take possession of any crops harvested, loaded or transported; (c) to take any action to forfeit bonds, or to deny or revoke licenses of the plaintiff because of harvesting, loading or transporting such crops; or (d) to take any other action penalizing, injuring or damaging plaintiff on account of or because of such harvesting, loading or transporting in interstate commerce shall be permanent.

DATED this 4th day of March, 1968.

CHARLES M. MERRILL
Charles M. Merrill, U.S. Circuit Judge
WALTER E. CRAIG
Walter E. Craig, U.S. District Judge
C. A. MUECKE
C. A. Muecke, U.S. District Judge